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No. 91-1076

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

LONG BEACH EQUITIES, INC.,

Petitioner,

v.

COUNTY OF VENTURA, CALIFORNIA, and
CITY OF SIMI VALLEY, CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SIX

OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The central question concerning the County of Ventura, the Ventura County Board of Supervisors, and the Ventura County Planning Commission (collectively referred to as "County") is whether local government acts within the permissible scope of its police power, and without liability for inverse condemnation damages, if it requires annexation as a condition of urban development.

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STATEMENT OF THE CASE

Summary Analysis of Question Presented

Petitioner claims that the County of Ventura has violated its rights under the Fourteenth Amendment of the United States Constitution and has taken property for public use without just compensation because the County of Ventura insists on applying to petitioner the County of Ventura's Guidelines for Orderly Development, in place since 1969, which affirmatively encourage annexation to adjacent cities of property slated for urban development.

Petitioner believes that the County of Ventura can properly comply with the United States Constitution only if it processes and approves within the unincorporated area a high density urban development consisting of 249 units on the 250-acre parcel owned by Long Beach

Equities since 1984. Petitioner also insists that the approval process be undertaken forthwith at a timetable not clearly specified consistent with petitioner's investment expectations.

The County of Ventura submits that the application of its regulations to petitioner, which basically amount to the requirement that annexation to the adjacent City of Simi Valley take place as a condition of the proposed urban development, comports with the traditional interpretation of this Court's opinion in Agins v. City of Tiburon (1980) 447 U.S. 255 requiring that constitutionally permissible regulations substantially advance legitimate state interests and not deny economically viable use of the regulated land.

Although the notion of "reasonable investment-backed expectations" has not

been reduced to a set formula the analysis already provided by this Court provides a sufficient basis to conclude that the County of Ventura did not deny the reasonable investment-backed expectations of Long Beach Equities.

Facts of This Case

Long Beach Equities alleges a constitutional violation because the County of Ventura insisted upon annexation of petitioner's property so that the high density, 249-unit development on approximately 250 acres would take place under the jurisdiction of the City of Simi Valley physically contiguous to petitioner's property which is within the sphere of influence and area of interest of the City, and within the sphere boundaries of sewer and water districts

under the exclusive control of the City Council of the City of Simi Valley.

At the outset of the project, petitioner recognized that annexation to the City of Simi Valley would be required both by City and County policy, and proceeded to design the development consistent with City development standards. (Petition for Writ of Certiorari, pp. 2-3; C.T. 764-765, ¶ 13 ("C.T." refers to the Clerk's Transcript on appeal.) Working under the assumption that annexation would be required, representatives of Long Beach Equities worked together with officials from the City of Simi Valley to do preparatory work for the project, including the development of a specific plan.

Although the property was located within the unincorporated area of the County of Ventura, petitioner knew that

the residential densities were inconsistent with the open space element of the Ventura County General Plan. Since 1981, three years before Long Beach Equities purchased the property, the property was designated as open space in the Ventura County General Plan, remained so designated throughout all times alleged in the complaint, and is so designated now. (C.T. pp. 226-228.)

California Government Code section 65567, enacted in 1970, would have required the County of Ventura to deny petitioner's proposed high-density residential development within the jurisdiction of the County because it was in 1984, and still is, inconsistent with the County's open space plan. The urban reserve overlay placed on the property (C.T. p. 145, ¶ 21; C.T. pp. 226-227) emphasizes the County's intention to

apply its Guidelines for Orderly Development, in place since 1969, (C.T. pp. 207-224) which would require annexation if the subject property were to develop as appellant requests.

At the time of purchase, petitioner also knew that the 250-acre parcel was within the City's sphere of influence and area of interest. (C.T. p. 139, ¶ 4; p. 144, ¶ 18.) Petitioner also knew that the water and sewer districts which would likely serve the subject property, the Simi Valley County Sanitation District and Waterworks District No. 8, have been governed by the City Council of the City of Simi Valley since 1970 and 1977, respectively. (C.T. p. 150, ¶ 36; pp. 238-245.)

Petitioner never obtained from the City or the County building permits or other final discretionary approval

sufficient to obtain vested rights to proceed with the particular development before the City adopted a growth management ordinance in late 1985, which petitioner claims, based on a subjective assessment, will cause an unacceptable delay in processing its development, rendering the development "economically infeasible."

The County reaffirmed its policy decision to require annexation in this particular case. On May 24, 1988, as part of a General Plan amendment, the Ventura County Board of Supervisors ("Board") rescinded the Simi Valley area plan applicable to a portion of the subject property, zoned most of the subject property OS-160 (C.T. p. 143, ¶ 14) and continued the urban reserve overlay already in place on the subject property since April 1984 (C.T. p. 227).

The balance of the Marr Ranch property is zoned A-E, allowing for a 40-acre minimum. (C.T. p. 230.) Since 1981, the subject property was designated open space on the General Plan, which would permit zoning for minimum lot sizes of 10 acres.

These actions of the Board were in keeping with the County's commitment to its Guidelines for Orderly Development, in place since 1969, which affirmatively encourage high density development within cities especially when the property at issue is within a city's sphere of influence and area of interest. The urban reserve overlay placed on properties the Board considers to be appropriate for eventual annexation and urbanization underscores their importance. Although the Board's actions of May 24, 1988, do emphasize and reaffirm

the Board's policy that the subject property be annexed before being developed with the type of intensity proposed by petitioner, this policy was assured, at least since 1981, by means of the open space designation applicable to the subject property. (C.T. pp. 226, 227, 228.)

In March 1985, Long Beach Equities first experienced a direct application of the County's annexation policy when it applied for a parcel map waiver for a subdivision into two separate lots. (C.T. pp. 697-700.) The staff report noted that the proposed residential project would not take place until annexation to the City of Simi Valley. (C.T. p. 698, § 2.) In addition to Government Code section 65567, which precludes urban development inconsistent with the open space plan, the County's

General Plan provided "[i]n the event that the Open Space Element differs with an area plan, the more restrictive designation/policy applies." (C.T. pp. 701-712, 724.)

Sometime in July or August 1988, Long Beach Equities abandoned its earlier plan to develop within the City's jurisdiction and requested an application to process the 249-unit project in the County's jurisdiction. (C.T. pp. 153-154, ¶ 44.) County staff allegedly refused to supply the tentative map application absent an application by Long Beach Equities also for a General Plan amendment first requiring a prescreening (C.T. 154, ¶¶ 44.1-44.3), which is logical given the County land use policies already in place. The County could not legally approve the Long Beach development absent a radical General Plan amendment.

Eventually Long Beach followed the appropriate procedure and filed a pre-screening application to amend the County's General Plan to permit development of the 250-acre parcel at a density of approximately one unit per one acre. (C.T. p. 154, ¶ 45.) The County denied the application, reaffirming that development of this density must occur within the City. (C.T. p. 155, ¶¶ 45.2, 45.6.)

Ultimately, Long Beach did file a tentative map application with the County. (C.T. pp. 246-251.) However, Long Beach does not allege any applications for a zone change to a higher density permitted under the open space designation, such as one unit per 10 acres, or any applications to develop the property within the County's jurisdiction consistent with the existing zoning and

General Plan, which allows for several uses including residential. (C.T. pp. 230-237.) Nor did Long Beach ever file a petition to annex the property to the City of Simi Valley or make any development application with the City.

The County and the City both recognize the reasonableness of having property which is a logical extension of the City actually develop within the City's jurisdiction. Based on this shared view of land use policy the County has encouraged Long Beach Equities to develop a project consistent with the City's requirements because the City would ultimately govern the development. Long Beach Equities willingly cooperated with this policy until they concluded that it would not suit their own development timetable.

What was once accepted by Long Beach Equities as a cooperative endeavor between City and County to foster orderly urban development is now labeled an illegal conspiracy. Instead of applying for annexation through the Local Agency Formation Commission and other appropriate agencies and making an application to the City for a development permit, which Long Beach Equities recognized to be the appropriate course when it purchased the property, Long Beach Equities chose litigation to undermine legislative policy.

ARGUMENT

I

THE COUNTY'S GUIDELINES FOR ORDERLY DEVELOPMENT SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST AND DO NOT DENY THE ECONOMICALLY VIABLE USE OF LONG BEACH EQUITIES' PROPERTY

The Court of Appeal's decision upholding the legitimacy of the County's Guidelines for Orderly Development is consistent with existing state and federal cases supporting the conclusion that such regulation does not constitute a regulatory taking within the meaning of Agins v. City of Tiburon (1980), 447 U.S. 255.

At stake here is the County of Ventura's Guidelines for Orderly Development, in place since 1969, which affirmatively encourage annexation to adjacent

cities of property slated for urban development, instead of the creation of new urban communities adjacent to existing cities but under County jurisdiction. This policy is especially appropriate in circumstances such as here where the development area is physically contiguous with and in the sphere of influence and area of interest of the City of Simi Valley.

The Guidelines, of which the Court took judicial notice (Exhibit C, p. 3-5, Exhibit F, p. 2 to Petition for Writ of Certiorari), advance the legitimate state interest of locating urban development in cities which promotes the efficient and effective delivery of community services, the conservation of County resources and orderly pattern of development, precludes the premature conversion of open space, and assures that urban communities

physically contiguous to adjacent cities have political control through the voting process over the city officials directly responsible for providing urban services and community planning.

The County's Guidelines, as well as the city's growth management ordinance, do not deny economically viable use of the 250 acres at issue, which are ultimately suitable for urban development. The city's General Plan considers the area appropriate for residential development in the density requested by the developer. The County's Open Space Plan designates the area as open space with an urban reserve overlay which contemplates residential development consistent with the city's development standards after annexation to the city. Hence, the very use which petitioner requests is not only

not precluded, it is affirmatively encouraged.

The analysis of whether a land use regulation substantially advances a legitimate state interest must carefully distinguish the state interest, which is a matter of legislative policy to which the courts defer absent arbitrary action, from the regulations implementing the state interest which must substantially advance those interests. (Agins, supra, 447 U.S. 255; Nollan v. California Coastal Com'n. (1987) 483 U.S. 825, 841.) Here, the open space general plan designation, together with the urban reserve overlay and annexation requirement, indisputably advance the legitimate state interest of requiring that urban development take place in cities, which in turn promotes the conservation of County resources, the efficient and effective

delivery of community services and orderly patterns of development.

The legislation of that policy in the first instance is to be accorded the traditional deferential test which recognizes that the Legislature may properly determine the public goals and purposes. (Hawaii Housing Authority v. Midkiff (1984) 467 U.S. 229, 242-243.) The means implementing the legislative goals, here the general plan and Guidelines for Orderly Development, must be such that they substantially advance the legitimate state interest or policy. Judicial review of the rationality of the state's exercise of its police power concerns only whether the state could rationally have decided that the adopted measures achieve the state's objective. (Nollan, supra, 483 U.S. at 843-844.)

By placing the open space designation in the general plan, together with the requirement of California Government Code section 65567 and the annexation requirement, the local Legislature has assured that its interest of having urban development take place in cities will be effectuated. It has already been determined that the use of the general plan to implement orderly urban growth substantially advances a legitimate state interest (Agins, supra, 447 U.S. at 262) and that it is a proper exercise of the police power to organize urban development by means of various general planning tools. (Nollan, supra, at pp. 835-836).

Long Beach Equities' real quarrel is not with the implementing legislation but with the initial adoption of the state interest. They simply do not agree with the policy that urban development should

take place within the jurisdiction of the city, at least in cases where adjacent city regulations do not suit their interest. Once this is recognized, it becomes clear that petitioner really wants this Court to assume the legislative function of making land use policy. However, this Court has made it clear that debates over the wisdom of socio-economic legislation are not to be carried out in the federal courts. Where the Legislature's purpose is legitimate and its means are not irrational deference to the legislative decision is the traditional course of action. (Midkiff, supra, 467 U.S. at p. 243.)

II

REASONABLE INVESTMENT-BACKED EXPECTATIONS ARE A FUNCTION OF EXISTING ENTITLEMENTS AND REASONABLY FORESEEABLE DEVELOPMENT CONDITIONS, NOT SUBJECTIVE EXPECTATIONS

No case affirmatively holds that reasonable investment-backed expectations is a third prong to the Agins test for a regulatory taking: Whether the regulation substantially advances a legitimate state interest or denies an owner economically viable use of his land.

The concept of reasonable investment-backed expectations has been noted in the taking cases, but as part of an analysis of whether an individual had an underlying entitlement which could be said to be taken by a given regulation. For example, in Kaiser Aetna v. United States

(1979) 444 U.S. 164, at page 180, the court held that the government's creation of a public right of access to an improved pond constituted a taking. In reaching that conclusion the court relied on Hawaii law which considered the pond to be private property and not part of a navigable stream, which the courts traditionally have recognized as being incapable of private ownership. Having determined the underlying entitlement of the owners to use the pond as private property not subject to navigation easements, the court concluded that imposition of the navigation servitude would result in an actual physical invasion of a privately owned marina. (Id. at pp. 179-180.)

In Ruckelshaus v. Monsanto Co. (1984) 467 U.S. 986, the court noted that disclosure by the government of trade

secrets might constitute a taking of Monsanto's property interest in the research data submitted to the EPA because there was an "explicit governmental guarantee" that such information would not be released. Monsanto's designation of the information as trade secrets plus the government's explicit guarantee of nondisclosure formed the basis of a reasonable investment-backed expectation. (Id. at pp. 1010-1011.)

The notion of reasonable investment-backed expectations does not do away with the well-established principle that the hallmark of property is an individual entitlement grounded in some independent source consisting of rules and understandings such as state law. (Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422,

430; Board of Regents of State Colleges v. Roth (1972) 408 U.S. 564, 577.)

Under California law, a developer has a right to proceed with a particular development plan only after having obtained all necessary government permits and expended substantial sums in reliance thereon. (Billings v. California Coastal Com. (1980) 103 Cal.App.3d 729, 735-736; Avco Community Developers, Inc. v. South Coast Regional Comm. (1976) 17 Cal.3d 785, 791-798.) A developer may also acquire such a right to develop in a particular way by means of a developer agreement (Cal. Gov. Code, § 65864 et seq.) or a vesting tentative map (Cal. Gov. Code, § 66498.1-66498.9).

Long Beach Equities does not have any specific entitlement necessary to support a reasonable investment-backed expectation to develop without meeting the

County's annexation policy. They have not acquired explicit guarantees in the form of a developer agreement nor expended substantial sums in reliance on a building permit or its functional equivalent. Moreover, in this case, the record is clear that Long Beach Equities fully expected to follow County policy. Therefore, both as a matter of law and based on undisputed facts in the record, Long Beach Equities could not reasonably have expected to develop within the unincorporated area at the proposed urban densities without annexation.

The concept of reasonable investment-backed expectations also includes the notion of foreseeable regulation. In Connolly v. Pension Ben. Guar. Corp. (1986) 475 U.S. 211, 228, the court observed that those who do business in a regulated field cannot object if the

legislative scheme is buttressed by subsequent amendments to achieve certain legislative ends. A fortiori, a developer cannot reasonably expect county government to make radical changes in its land use policy in effect at the time the property was purchased simply to accommodate a developer's building timetable.

In Kirby Forest Industries, Inc. v. United States (1984) 467 U.S. 1, at page 14, the court explained the principle underlying distinct investment-backed expectations as follows:

> "The principle that underlies this doctrine is that, while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners

> as concomitants of 'the advantage of living and doing business in a civilized community' [fn.] some are so substantial and unforeseeable, and can so easily be identified and redistributed, that 'justice and fairness' require that they be borne by the public as a whole."

Petitioner can hardly claim that the County's annexation requirement was unforeseeable in this case since it had been in place since 1969, implemented as to the subject property by its open space plan in place since 1981, and underscored by the urban reserve overlay designation on the subject property. Petitioner not only foresaw this regulation but, at the outset of the development process, sought to comply with it by working with the

City to design the development consistent with City standards with the understanding that the property would be annexed and ultimately subject to the City's jurisdiction.

CONCLUSION

Therefore, it is respectfully requested that the petition for writ of certiorari be denied. The Court of Appeal's decision follows traditional and well-established legal principles announced by this Court which support the County's regulatory role under these circumstances.

Dated: January 9, 1992

Respectfully submitted,

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